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China, Peoples Republic of

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Protect your Trademark... before Someone else Trades Your Mark

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Report Highlights:

China's rapid growth in production, income and spending has led to a commensurate growth in demand for food and other products. While quality U.S. food products often make it to store shelves, an estimated 20-30 percent of products are counterfeit. China's "first-to file" system requires no evidence of prior use or ownership, leaving registration of popular foreign marks open to third parties. Foreign companies that have established themselves in China include protecting their intellectual property as an integral part of the cost of doing business. This means registering your trademark with the China trademark office, and ensuring you understand as well as use the progressive enforcement mechanisms available in China to stop infringers.

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SUMMARY

China's rapid growth in production, income and spending has led to a commensurate growth in demand for food and other products. While quality U.S. food products often make it to store shelves, an estimated 20-30 percent of products are counterfeit. China's "first-to file" system requires no evidence of prior use or ownership, leaving registration of popular foreign marks open to third parties. Foreign companies that have established themselves in China include protecting their intellectual property as an integral part of the cost of doing business. This means registering your trademark with the China trademark office, and ensuring you understand as well as use the progressive enforcement mechanisms available in China to stop infringers.

Even though China is a party to international agreements to protect intellectual property and the China's Anti-unfair Competition Law provides some protection for unregistered trademarks, a company must register its trademarks with the appropriate Chinese agencies for property security in China. In 1998, China established the State Intellectual Property Office (SIPO), with the vision that it would coordinate China's IP enforcement efforts by merging the patent, trademark and copyright offices under one authority. However, this has yet to occur. Today, SIPO is responsible for granting patents (national office), registering semiconductor layout designs (national office), and enforcing patents (local SIPO offices), as well as coordinating domestic foreign-related IPR issues involving copyrights, trademarks, patents, and plant variety protection laws.

BACKGROUND

China has had special provisions for the protection of "well-known" marks since 1996. China is required to provide national treatment to foreign marks holders, as part of its WTO accession as well as other international commitments. However, many companies continue to complain that their marks are not treated in the same manner as Chinese marks. In 2002 new Implementing Regulations were issued, in part, to bring China's trademark legislation into compliance with the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). The revised Trademark Law extended protection to collective marks, certification marks and three-dimensional symbols, as required by TRIPS.

As China's economy continues to expand and China implements its WTO commitments, increasing numbers of small and medium size U.S. agricultural and food product companies have sought – and found – opportunities to sell their goods in China. With U.S. exports to China increasing, more U.S. firms than ever before have questions about how to succeed in the China market, and at the top of their list is how to protect their company's trademark. Since joining the WTO, China has strengthened its legal framework and amended its laws and regulations regarding trademark protection. However, despite stronger statutory protection, China continues to be a haven for pirates.

New market entrants should develop a strategy for protecting their company's trademark early in the planning stages of doing business in China. Registration of trademarks before the product enters the stream of commerce in China is the primary means of ensuring that the mark is eligible for protection under Chinese law, and ensuring that trademark infringement can be remedied through either administrative or judicial proceedings.

While the United States confers trademark rights upon the first party to use a trademark in commerce, China has established a "first-to-file" system that grants trademark rights to the party that first applies to register a trademark. Article 24 of the Trademark Law provides that where, within six months of applying to register a trademark outside China, the trademark registrant applies to register the same trademark for the same type of product in China, they will receive priority registration in accordance with bilateral agreements between

that country and China, or multilateral agreements to which both countries are party. Thus, *register your mark early!*

A trademark that is registered in one class of use may not be protected against registrations or infringement in another class of use, unless it is well known. Under China's system of administrative enforcement, treatment of a mark as well known may facilitate administrative raids and/or criminal enforcement against commercial scale infringers. Chinese authorities have also promulgated from time to time lists of trademarks for "enhanced enforcement" or have judicially recognized marks as well known on a case-by-case basis, which occasionally may provide the same results as well-known mark recognition by administrative authorities. Many Chinese companies use their "well-known mark" recognition as a marketing tool, which has little to do with intellectual property protection per se.

TRADEMARK REGISTRATION ELIGIBILITY

Article 8 of the Trademark Law states that words, designs, letters, numbers, three-dimensional signs, and color combinations, as well as combinations of the aforementioned elements may be the subject of an application for trademark.

Companies can register the following types of trademarks in China:

- *Product trademarks* - affixed to and identify goods
- *Service trademarks* - service providers use to identify the company providing the service, i.e. the trademark for an airline
- *Certification marks* - symbols that are controlled by an organization that has the ability to oversee certain products or services and which are used by companies or individuals other than the overseeing organization on their products or services to verify the original place of manufacture, the raw materials used, the method of manufacture, the quality or other specific features
- *Collective trademarks* - symbols registered in the name of groups, associations or other organizations for the use of members of the group in their commercial activities to indicate their membership of the group.

A mark is eligible for trademark registration if it is distinctive, easily distinguishable, does not conflict with the prior lawful rights obtained by a third party and is not otherwise prohibited by the Trademark Law. However, there are symbols, which are prohibited and cannot be registered trademarks, which include:

- The Chinese State name, national flag, national emblem, military flags or military decorations of the PRC, other country or intergovernmental or international organization, unless approved by such government or organization
- Special names of places where Chinese government offices are located, or names or images of symbolic buildings
- Official symbols or inspection imprints that indicate the implementation of controls or that give guarantees, unless authorized; i.e., Red Cross or Red Crescent
- Racially discriminatory
- Exaggerated claims or are fraudulent
- Harm socialist moral behavior or have other undesirable effects
- Contain a product's generic name, graphics or model
- Merely directly indicate a product's quality, main raw materials, function, weight, quantity or other characteristics

- Lack any prominent characteristics

TRADEMARK REGISTRATION PROCEDURE

Companies that would like to determine the application status of an international trademark registration in China should seek advice from an experienced foreign or Chinese attorney. Engage the assistance of legal professionals with both China and IPR expertise early in the process, and involve them in the development of your overall Chinese business strategy. In addition, develop and register a Chinese language version, and do so throughout the other jurisdictions of "Greater China," including Hong Kong, Taiwan, Macao, and Singapore, as well as other countries. If you do not create a Chinese mark, the market will do so, creating a Chinese "nickname" for your product. Your company may not like the image this mark projects, or someone else in China may like it so much they register it in their own name, forcing you to "buy it back."

Any natural, legal person or other organization is qualified to be a trademark owner in China. A Chinese trademark agency can advise in the preparation of the required documents. Required documents include: a) *Trademark Registration Application*, b) *Power of Attorney*, c) *Identity Card*, and d) *Six copies of Trademark Sample*. The fee for filing one trademark registration application in one international class is RMB 1000 (US\$ 128.90 at an exchange rate of RMB 7.76 to US\$ 1) covering 10 good or service items. Each good or service item exceeding the initial 10 items, in any given application, has an additional official fee of RMB 100 (US\$ 12.90). Agent's service fees for filing one trademark in one class are about US\$ 500. These fees do not include costs for conducting trademark searches, reporting publication and registration, or dealing with any official actions in the process of registration, like litigating an opposition challenge.

To ensure efficient trademark registration the procedure should be as follows:

1) Design and Select a Trademark

Design a trademark to be registered in China. Any visible signs including words, designs, letters, numerals, three-dimensional designs, combination of colors, or any combination of these can be a registered trademark. Next, search prior trademarks for any conflicts. There are two ways to search for prior trademarks: the Chinese Trademark Office website (<http://sbcx.saic.gov.cn/trade/index.jsp>) which is free and the Tongda Trademark Service Center under the General Administration of Industry and Commerce, which charges a fee.

2) Locate and Select a Registration Agency

Individuals or entities not located in China must appoint a Chinese trademark registration agency (<http://sbj.saic.gov.cn/sbsq/dljg.asp>) or an intellectual property rights attorney to register the trademark. U.S. agricultural enterprises with offices in China are also advised to seek professional assistance in their trademark registration.

3) Complete Required Documents

After confirming the availability of your trademark right, the trademark agent will assist the applicant with completing the necessary documents and selecting the class and description of the good or service. In addition, the applicant's full name and address are required in the original language (English) and Chinese. If the applicant has a previous trademark application or registration in China, the same Chinese name should be used. If the applicant does not have a Chinese name, the trademark agent can provide one.

The required information and documents include:

- a) *Trademark Registration Application* – A trademark application should be limited to one trademark of one type and be written in Chinese. The application should indicate the

following items in both Chinese and the native language (English): name, nationality, complete address of the applicant, complete telephone number, fax number, joint application (if applying jointly for a trademark, attach the other applicant's name on a separate page), class of trademark (choose common and indicate if trademark feature is either tri-dimensional, colored or both), a brief description of trademark characteristics, country of first trademark registration, date of prior application, prior application number, class, and characteristic of product or service. The application needs to be signed by the applicant or his legal representative. If it is a joint trademark application, all the applicants need to sign.

- b) *Power of Attorney* – The power of attorney for trademark consignment, indicating the content of consignment, limitation and the consigner's nationality. The power of attorney should be appropriately signed and/or affixed with the seal of the applicant, granting the registration agency the right to file on the applicant's behalf.
- c) *Identity Card* - If the applicant is a natural person, a copy of the individual's Identity Card together with the ID number, or a copy of the passport including the passport number.
- d) *Six copies of Common Mark Samples* – If the mark is in color, one black and white copy must be included as part of the submission.

4) Submit Required Documents

The agency will submit the completed documents to the Trademark Office on the applicant's behalf. Regardless of country, priority right will be given to the applicant with the earliest submission date of a trademark registration application. There are two methods to claim priority rights earlier than the application submission date. One is based on a U.S. trademark application, if made within 6 months of the Chinese trademark application. The other is exhibition of the trademark in a recognized Chinese trade show within 6 months prior to the Chinese trademark application.

The applicant, who originally submitted the trademark registration application to the U.S. Patent and Trademark Office (USPTO), will have 6 months to claim priority right on this initial submission date. However, if the applicant cannot supply a certified copy of the application to the China trademark registration agency with the application, the applicant will have 3 months to provide the certified copy of the U.S. application to the China trademark registration agency. Irrespective of whether an applicant is claiming priority right, the filing number, date and country where the trademark was submitted must be provided.

If a product's mark is first shown at a Chinese Central government exhibition or an international exhibition recognized by the Chinese Central government, then the applicant of the mark has priority right for 6 months from the exhibition day. The applicant has to claim the priority in writing with the application and provide proof of the mark's use at the exhibition. If the applicant cannot supply the documents with the application, the applicant will have 3 months to provide the documents.

Once the application is submitted to the China Trademark Office, an acceptance notice will be issued within 4-6 months. At this time, applications are backlogged between 2 and 3 years before examination. Once the examination is complete, the common mark will be published in the Trademark Gazette for a 3-month opposition period. If no opposition is filed, the common mark will be approved for registration and the registration certificate will be issued. In general, the period from application submission to registration is about 30-36 months. The registration is valid for 10 years, and can be renewed.

TRADEMARK OPPOSITION

A company may file an opposition, if it discovers that another company has received preliminary approval for a mark that would infringe on the company's mark. However, this must be done within three months of publication of preliminary approval in the Trademark Gazette by submitting an "Application for Trademark Opposition" in duplicate to the Trademark Office. Thereafter, the parties are entitled to provide additional information, within strict time limits. It is important for a company to use experienced trademark counsel to advise on filing an opposition.

In addition, if your company discovers that another company has completed a registration of a trademark you believe infringes on your company's mark, your company may attempt to cancel the registered mark. However, cancellation is more difficult than an opposition and is more time consuming and expensive.

TRADEMARK INFRINGEMENT

If you discover that your trademark is being infringed, do something immediately to protect and enforce your rights. When trademark infringement occurs the Trademark Law allows a registered trademark owner to seek redress through the People's Court, administrative adjudication, or Public Security Bureau. The Trademark Law's Implementing Regulations, states the following are acts of infringement:

- Using a trademark that is the same as or similar to a registered trademark on the same or similar goods without the authorization of the registered trademark holder
- Selling products that violate the exclusive right to use a registered trademark
- Counterfeiting or fabricating without authorization a mark or a symbol that is part of a registered trademark of another person, or selling marks or symbols that have been made or fabricated without permission
- Modifying a registered mark without the authorization of the registered owner and putting on the market products with the modified mark
- Use of identical or similar words, graphics or packaging as that of a registered trademark in connection with identical or similar goods to mislead others
- Causing harm in other respects to the registered trademark holder's right to exclusive use
- Providing transport, storage, mailing, hiding or other conveniences in order to facilitate others in the infringement of the exclusive rights of a registered trademark holder

TRADEMARK PROTECTION – ADMINISTRATIVE ADJUDICATION

In most cases, rights holders seek administrative adjudication of trademark infringement because the investigations can occur shortly after filing the complaint, the rights holder may, in some cases participate in the investigation, and only a few weeks are required for a determination of infringement or non-infringement and, if appropriate, the imposition of a remedy.

However, there are some disadvantages of the administrative channel which include: the rights holder receives no compensation for IPR infringement; sometimes administrative agencies refuse to investigate a complaint due to local protectionism, corruption or lack of resources; and fines are too low to put the infringer out of business or deter future criminal activity. Yet, a local AIC Trademark Division may impose remedies, which include: cease and desist orders; confiscation and destruction of trademark representations, in which authentic goods may be returned to the alleged infringer; confiscation of materials, tools and equipment used mainly for production of infringing goods and trademark representations; fines up to a maximum of three times the illegal profit, or in cases where it is difficult to determine the illegal profit, a maximum fine of RMB 100, 000 (US\$ 12,000). *Note:*

Compensatory damages cannot be awarded to the rights holder through the administrative adjudication process. The rights holder can seek compensatory damages through civil litigation.

TRADEMARK PROTECTION – PEOPLE’S COURT

According to the Supreme People's Court, a registered trademark owner may file a lawsuit for trademark infringement; where he authorities are storing, sealing, or detaining infringing products; or where the infringer is domiciled. A foreign right holder is allowed to file its complaint before the Economic or Intellectual Property Division of the People's Intermediate Court. The rights holder is required to demonstrate that (a) the alleged infringing act involves a mark that is identical or similar to a registered trademark; (b) the infringing representation of a registered trademark was used in connection with or affixed to similar goods or services; (c) the unlawful act interfered with the registered trademark holder's right of exclusive use or caused the registered trademark holder economic loss. The statute of limitation for bringing a suit to remedy trademark infringement is two years, commencing on the date the trademark registrant knew or should have known about the act of infringement.

A trademark registrant, licensee, or other party of interest may also petition the people's court to issue a preliminary injunction and order preservation of evidence. The court may require the petitioner to "provide security" or a bond prior to the issuance of the injunction. The amount ordered is usually a percentage of the value of the goods. Within 48 hours of receiving a petition, the court must decide whether to grant the petition. The preservation measures will be removed in the event that the petitioner does not file a lawsuit within 15 days after execution of the preservation measures.

In addition to the administrative remedies listed above, the People's Court may also award compensatory damages to the trademark rights holder. In cases where it is difficult to determine the damages suffered by the rights holder, the court may order the defendant to pay an amount not to exceed RMB 500,000 (US\$60,000).

TRADEMARK PROTECTION – PUBLIC SECURITY BUREAU

In circumstances where trademark infringement is "serious," the Trademark Office is required to refer the complaint to the public security bureau for investigation, which in turn may recommend prosecution by the procuratorate. The criteria for determining whether a case is serious enough to merit criminal prosecution is not stated in the laws and regulations that govern trademarks, but Chinese officials have stated in other administrative directives that the quantity of infringing products produced, the amount of illegal gain, or the prospective injury to public health and safety are factors to be considered.

Depending on the "seriousness" of the crime or the "huge" volume of sales, the defendant may be sentenced from two to seven years imprisonment, and may also be fined between half and twice the amount of earnings from the illegal sales. The law does not stipulate what constitutes a serious circumstance or huge amount of illegal income. The sentencing guidelines for "crimes of producing and marketing fake or substandard commodities," are described in Article 140 of the Criminal Law, indicating what may be considered a serious offense that harms public health and safety.

Some foreign trademark holders have complained that the local AICs rarely refer cases for criminal prosecution due to inter-agency conflicts within the local government. Administrative agencies may have a financial incentive to adjudicate cases that are more appropriate for criminal prosecution because the administrative fines paid by the respondent go to the coffers of the administrative agency.

The "Provisions on Standards for Prosecution of Economic Crimes," jointly issued by the Supreme People's Procuratorate and the Ministry of Public Security on April 18, 2001, sets out criteria for criminal prosecution. The standards apply to manufacturers, sellers (wholesale and retail) and others involved in counterfeiting activity. In a case involving the use of a mark identical to a registered trademark on the same goods without the permission of the owner of the registered trademark shall be prosecuted in the following circumstances:

- Individual counterfeiting of another's registered trademark where the illegal turnover exceeds RMB100,000
- A unit counterfeiting of another's registered trademark where the illegal turnover exceeds RMB500,000
- Counterfeiting a well-known trademark or a trademark of medication for human consumption
- Not reaching these thresholds, but counterfeiting the registered trademark of another after having been twice subjected to administrative penalties.

In addition, the knowing sale of counterfeit goods of a registered trademark shall be prosecuted where the amount of sale is over RMB100,000 by an individual or over RMB500,000 by a unit. Furthermore, a case involving the counterfeit and/or unauthorized fabrication of representations of another's registered trademark or sale of such representations shall be prosecuted where one of the following circumstances are suspected:

- Illegal fabrication of representations of a registered trademark and sale of over 20,000 pieces or sets, or where the illegal gain exceeds RMB 20,000 or the illegal turnover exceeds RMB 200,000 in the aggregate
- Illegal fabrication of representations of a well-known trademark and sale of such representations
- Not reaching the above-said number or amount but illegally fabricating representations of a registered trademark and the sale of such representations after have been subjected to an administrative penalty
- Sale of the illegally fabricated representations of a registered trademark by illegal means such as bribes, etc.

ADDITIONAL TRADEMARK PROTECTION – GAC PROACTIVE REQUEST

Another agency that rights holders may approach to combat trademark infringement is the General Administration of Customs ("GAC"). Through registration with the GAC in Beijing, the Customs Measures may provide protection for all categories of IPR, including trademark, and prohibit the import or export of goods in violation of those rights. Registering proactively with the GAC before an infringement occurs allows a trademark holder to expedite the approval of an application for Customs protection if an infringement actually does occur. An application for proactive registration should contain the following information:

- The name, nationality or registration locality, address, legal representative and primary business location of the trademark owner
- Information on the trademark to be protected, including documentation establishing trademark ownership
- A list of persons authorized or licensed to use the trademark
- Information on the products to which the trademark is related, including the manufacturer, primary importers or exporters, primary points of customs entry or exit, key product characteristics and price
- The name, place of manufacture, key product characteristics, standard prices, primary importers or exporters, and primary points of customs entry or exit, and if known, information concerning any infringing products
- The application should be accompanied by the following documentation:

- A photocopy certified by the registration authority of the registration certificate of the trademark holder
- Documentary proof of trademark ownership
- Other documents required by Customs

The GAC must respond to an application within 30 working days of receipt. The application and subsequent approval forms will be placed on file immediately. The application and approval is valid for ten years, renewable within six months of the end of the term. Any changes should be reported to Customs within 30 working days.

ADDITIONAL TRADEMARK PROTECTION – CUSTOMS PROTECTION

A trademark holder may seek Customs protection against actual infringement. If a proactive request is not already on file for a trademark for which customs protection is being sought, the request must be submitted along with the application for Customs protection (see above). In addition, if Customs discovers goods that appear to infringe upon a trademark already on file, Customs may on its own initiative seize the goods. Customs will then provide immediate written notice to the trademark holder, who must file an application for Customs protection within three days after receipt of such notice.

An application for customs protection from an actual infringement should include the following:

- The trademark being infringed
- The Customs number assigned to the request upon approval
- The name, address, legal representative or primary place of business of the suspected infringer
- The name, specifications and other information concerning the infringing products
- Possible ports of entry or exit, the time, mode of transport and recipient (imports) or sender (exports) of the infringing products
- Evidence establishing the infringement
- Measures requested to be taken by Customs
- Other information required by Customs

If the trademark holder requests that the infringing products be seized, the trademark holder must post a security deposit with Customs equal to no less than the equivalent value of the goods, which shall be used to indemnify the losses caused to the consignee or consigner if the detainment is found to be inappropriate and to pay for warehousing, custody and disposal fees. The specific measures of payment will be determined by the GAC.

If Customs agrees to seize the products, Customs will send a Customs Holding Receipt to the recipient or sender of the products, as the case may be, and provide written notice to the trademark holder. The recipient or sender of the goods may submit a written explanation as to why the products do not infringe upon the trademark. Customs will provide written notice of the objections to the trademark holder. If the recipient or sender of the goods believes that the products do not infringe upon the trademark, it may, after posting a security deposit with Customs equivalent to the value of the goods, request Customs to release the goods. If the intellectual property right holder fails to bring a lawsuit to the people's court within a reasonable time, Customs will refund the guaranty bond.

If the recipient or sender of the goods raises no objection, Customs shall have the authority to dispose of the products immediately as "infringing products." Unless the trademark holder has referred the matter to a local trademark authority or a People's Court within 15 days of receiving notice of the seizure, Customs will commence an investigation. Customs may release the products held under any of the following circumstances:

- The products are found not to be infringing after investigation by Customs or by a local trademark authority
- The case filed with a People's Court is dismissed or the court does not impose an order for preservation of evidence
- The trademark holder does not respond to notice received from Customs within the stipulated period or abandons its request for Customs protection
- When products are released under any of the above, Customs will refund the security deposit after deducting costs for storing, safekeeping and handling the goods and any compensation payable to the importer or exporter.

If Customs, a local trademark authority, or a People's Court determines that the seized products are infringing, the products will be confiscated and disposed of by Customs. Customs may also impose penalties equivalent to the CIF price (cost, insurance, freight) (in the case of imports) or FOB price (free on board) (in the case of exports) of the goods. A party may request reconsideration of a decision by Customs within 30 days of receiving written notice of the imposition of a penalty, or within 30 days of public notice of the imposition of the penalty if written notice cannot be provided. Customs must determine a request for reconsideration within 90 days of the date that application for reconsideration is filed. A dissatisfied party may appeal a decision on reconsideration to the relevant People's Court within 30 days.

TRADEMARK REVIEW AND ARBITRATION BOARD (TRAB)

Formerly, decisions made by the Trademark Review and Arbitration Board (TRAB) were not subject to judicial review. This was changed when the Trademark Law was revised to bring China's regulations into compliance with the WTO TRIPS Agreement. A party that is dissatisfied with a decision made by the Trademark Office to reject an application for trademark registration may appeal to the TRAB within 15 days of receiving notification of an administrative decision. Where the applicant is dissatisfied with the TRAB decision, it may seek judicial review by filing an administrative appeal to the People's Court within 30 days of receiving written notification of the TRAB decision.

CHINA'S FUTURE COMMITMENTS TO TRADEMARKS

As China's economy continues to expand and China implements its WTO commitments, it also wants to increase international companies' confidence to register and sell their goods in China. Along with implementing a legal framework and laws to protect IPR, the Chinese government also coordinates, twice per year, nationwide campaigns to remove counterfeit products from the market, and also features a new product, that has infringement potential. The campaigns are led by the administrative agencies that are responsible for enforcement of the Product Quality Law, Anti-unfair Competition Law, and Criminal Law. On some occasions, these campaigns include a public education component to discourage consumers from purchasing counterfeit products. Chinese government agencies claim such campaigns are effective because they are conducted on a large scale and are highly publicized.

In addition, once your trademark is registered, your protection is extensive. China's increasingly large infrastructure of 'piracy police' are developing into a significant force to deal with China's counterfeiting challenges, and once your product is registered you have the option of focusing their attention on the protection of your trademark.

In response to these trademark property threats, FAS China established the FAS Beijing IPR Office located in the Agricultural Trade Office (ATO), Beijing. The office provides intellectual property assistance to U.S. cooperators, agricultural companies and interests, newly entering or already established in the China market.

For assistance, refer to other GAIN reports on IP or contact:

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